Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

MANFRED KRUGER and
CRISTINA KRUGER,
Petitioners,

vs.

SONIC RESTAURANTS INC.,
Respondent

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

MANFRED KRUGER and
CRISTINA KRUGER
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63 pp

QUESTIONS PRESENTED

I. May a federal court enforce a contract which by its terms necessitates commission of a federal crime?

II. May a district court grant a motion for summary judgment when there is a disputed material fact?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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No.

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MANFRED KRUGER and
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SONIC RESTAURANTS INC.
Respondent

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Manfred Kruger and Cristina Kruger, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The unreported opinion and order of the Court of Appeals are reproduced in the Appendix filed herewith at 1a. The unreported judgment and order of the district court are reproduced in the Appendix filed herewith at 7a and 26a, respectively. The unreported memorandum opinion of the District Court in this case is reproduced in the Appendix filed herewith at 30a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on January 7, 1997. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The pertinent provision of Title 26 of the Internal Revenue Code, 26 U.S.C.A § 7201 is set forth below:

§ 7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

The pertinent provision of Title 26 of the Internal Revenue Code, 26 U.S.C.A § 7207 is set forth below:

§ 7207. Fraudulent returns, statements, or other documents.

Any person who willfully delivers or discloses to the Secretary any list, return, account, statements, or other document, known by him to be false as to any material matter, shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both.

STATEMENT OF THE CASE

Manfred and Cristina Kruger both worked for Sonic Restaurants Inc. (hereinafter "S.R.I.") Manfred was an area supervisor, while Cristina was an hourly employee. The Krugers working relationship with S.R.I. lasted from November, 1993 until April, 1995. During their employment, the Krugers timely filed W-4 forms and S.R.I. withheld appropriate employee taxes. On separate occasions, the Krugers each sustained serious injuries while working. After these incidents, S.R.I. terminated the Krugers' employment. After their terminations, S.R.I. withheld Mr. Kruger's final two paychecks. The Krugers needed their money desperately, but were unable to compel S.R.I. to give them the past due paychecks. After Manfred Kruger informed S.R.I. of his financial hardship, S.R.I. Vice President of Operations, Frank Young, contacted Mr. Kruger and arranged for a brief meeting where he promised to tender Mr. Kruger's final two month's paychecks. Mr. Young would be boarding a flight at the local airport,

and arranged for the Krugers to meet him at his departing gate.

When the Krugers met Mr. Young at the airport gate, Mr. Young stated that he would only give the Krugers' already earned paychecks in exchange for the Krugers' signatures on a termination agreement (hereinafter "the Agreement" reproduced at App. 10a). Neither S.R.I. nor Mr. Young provided the Krugers with a copy of the contract before the meeting. The Agreement was not bargained for, in the sense that the Krugers had no input nor prior notice of contract's contents. When they arrived at the gate, the Krugers were only given a brief opportunity to glance over the Agreement, roughly ten minutes, before Mr. Young had to board his departing flight. They barely had time to finish reading it before Mr. Young had to leave. The Krugers were given no time to discuss the contract between themselves, nor did they have time to confer with a lawyer. They did not have adequate time or bargaining power to discuss the contract with Mr. Young before Mr. Young had to leave. The

Krugers needed the money desperately, and felt they had no choice but to sign the contract before Mr. Young left. S.R.I.'s previous behavior of withholding paychecks, coupled with S.R.I.'s superior bargaining position led the Krugers to reasonably believe that S.R.I. would not be willing to give them their final paychecks if they did not immediately sign the contract.

The main thrust of the Agreement was to characterize the Krugers' employment history as one of independent contractors, rather than one of employees. One can infer that by this contract S.R.I. hoped that it could claim before the federal courts and federal government that the Krugers had never been S.R.I. employees for purposes of government regulations, despite S.R.I.'s previous memos to the contrary, S.R.I.'s withholding of state and federal taxes from the Krugers' paychecks, S.R.I.'s filing of W-2 forms and North Carolina Employment Security forms, and a work history which showed that the Krugers were anything but independent contractors. Additionally, the contract provided a "liquidated

damages" clause. The clause stated that S.R.I. could claim $26,000 as "damages" should the Krugers file for unemployment or disability benefits--benefits they paid for by the taxes withheld by S.R.I. Finally, the contract called for Mr. Kruger to file a 1099 form with the Internal Revenue Service, despite S.R.I.'s previous filings of W-2 forms for Mr. Kruger. See App. at 14a. Under the terms of the contract, the Krugers are precluded from claiming to anyone in any manner that they were ever S.R.I. employees.

When Mr. Kruger had filed for unemployment and worker's compensation benefits as an S.R.I. ex-employee, S.R.I. brought suit against the Krugers in the Federal District Court for the Western District of Oklahoma. The District Court had diversity jurisdiction, with the amount in controversy exceeding $50,000. Under a breach of contract theory, S.R.I. sought damages as provided in the Agreement, and further sought injunctive relief to prevent Mr. and Ms. Kruger from further violating the Agreement. Broke and unemployed, Mr. and Ms. Kruger defended themselves *pro se*.

Among various defenses and counterclaims, the Krugers raised as an affirmative defense the fact that they signed the Agreement under duress. The Krugers also argued that the Agreement by its terms would force the parties commit criminal acts, namely tax fraud. On motion for summary judgment, the District Court rendered a memorandum opinion and order on March 22, 1996, granting partial summary judgment. Final judgment was rendered on May 29, 1996, granting monetary relief and ordering a permanent injunction against the Krugers.

The Krugers, again acting *pro se*, appealed their case to the Federal 10th Circuit. After denying the Kruger's motion for oral argument, the Tenth Circuit issued its opinion and order on January 7, 1997, sustaining the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The reason why the Supreme Court should grant the writ of certiorari is two-fold. First, the opinion of the Tenth Circuit in this case has created a rift between the Tenth and Seventh circuits as to the enforceability of the kind of contract involved herein. App. A, 1a; *United States v. Jungles*, 903 F2.d 468 (7th Cir. 1990). The Tenth Circuit has upheld a contract which forces the parties to lie the Internal Revenue Service about Mr. Kruger's employment status, and would allow S.R.I. to avoid paying employee related taxes on Mr. Kruger.

Indeed, the Tenth Circuit has upheld a permanent injunction of the district court *ordering* Mr. Kruger to either mislead the I.R.S. or be held in contempt. App. 2a, 8a. Previously, the Seventh Circuit has held a similar contract to be void as the contract could be considered by a jury to be evidence of a criminal act. 903 F.2d at 474. The Supreme Court needs to make a determination as to whether this kind of contract should be enforced by the courts.

Second, the appellate court was in error by upholding the district court's factual determination and ruling that the Krugers were not under duress when they signed the contract. App. 4a. Allowing this decision to stand despite that error could have national ramifications in cases similar to this one--where a *pro se* defendant, an unsophisticated layman, attempts to defend himself against skilled attorneys with practically unlimited resources. It should be incumbent upon a court in such an instance to give equal treatment to both sides. What happened in this case sets an unfortunate precedent that if a person cannot afford the same legal service as his adversary, he is not entitled to fair trial procedure. The Krugers are not trained in the legal intricacies of federal courts. They were unable to locate affordable counsel to represent them. They tried their best to represent themselves. Nevertheless, the district and appellate courts were more impressed with the arguments and authorities presented by S.R.I., to the point that they ignored the relevant evidence the Krugers presented before them. The Supreme Court should consider this

petition and show that the Federal court system provides equal justice, even to unequal participants.

I. A FEDERAL COURT MAY NOT ENFORCE A CONTRACT WHICH NECESSITATES COMMISSION OF A FEDERAL CRIME.

For purposes of Federal law, whether a person is an employee or an independent contractor depends on several factors such as control, permanency of relationship, skill required, investment in the work facilities, etc. *Bartles v. Birmingham,* 332 U.S. 126 (1947); See *United States v. Silk et al. and Harrison v. Greyvan Lines,* 331 U.S. 704 (1947). A contract between the employer and the employee will not change the analysis or the outcome of the determination. *Id.*

A brief review of the evidence presented to the district court shows that under analysis, Mr. Kruger was an employee of S.R.I.: S.R.I. trained Mr. Kruger in Texas, transferred him (expenses paid) to Louisiana and then to North Carolina, supervised

him in his work, and provided him with all necessary equipment and facilities. However, the Agreement not only stipulates that Mr. Kruger was an independent contractor, but states that he cannot claim otherwise. App 12a, 14a. Mr. Kruger repeatedly argued that the Agreement was criminal and false with respect to his employment status. But the appellate court felt that this argurment was irrelavent; they ruled the Agreement was binding regardless. App. 5a. However, since a private contract cannot alone alter one's employment status, should Mr. Kruger have been an employee of S.R.I., then the contract and the district court's injunction force Mr. Kruger to tell a falsehood. See *Bartles,* U.S. at 132, Such a contract is generally against public policy, and in this case is indeed illegal. See 26 U.S.C.A. § 7201 (West 1997); 26 U.S.C.A. § 7207 (West 1997); see also *United States v. Silk et al. and Harrison v. Greyvan Lines,* 331 U.S. 704 (1947).

The Agreement will lead to violations of federal law in two ways. First, federal law provides that one can not provide the I.R.S. with false or

misleading information. 26 U.S.C.A. § 7207 (West 1997). By forcing Mr. Kruger to file a tax return with a false statement of material fact, his employment status, the contract calls upon the parties to violate this criminal statute. Mr. Kruger could be fined or imprisoned by complying with the terms of the contract. *Id.* Contracts that provide for the parties to commit illegal acts are, as a general rule, unenforceable. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985). The general rule applies to this case. More specifically, a contract that purports to alter the employment status of a person is void if entering into such a contract may lead to violation of tax laws. *Jungles*, 903 F.2d at 474. If the decision of the lower court stands, then Mr. Kruger will be forced to choose between violating federal law or violating a court ordered injunction.

Second, a rational jury could reasonably conclude that S.R.I., by initiating and entering into the Agreement, has committed an "affirmative act" of tax evasion sufficient to support a felony conviction under 26 U.S.C.A. § 7201 (West 1997). In such a situation, the contract is void. *Jungles* , 903

U.S. at 474. As a matter of law, the Agreement should have been ruled unenforceable by the appellate court. *Id.*

II. A DISTRICT COURT MAY NOT GRANT A MOTION FOR SUMMARY JUDGMENT WHEN THERE IS A DISPUTED MATERIAL FACT.

Summary judgment shall only be granted if the record, taken as a whole, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56. On a motion to dismiss a claim, the reviewing court must view the facts in the light most favorable to the non-movant party. *Summit Heath, Ltd. v. Pinhas,* 500 U.S. 332, 325 (1991).

Whether or not the Krugers were forced through duress to sign the contract is a fact question. The appellate court felt that the Krugers had not submitted enough evidence to show they were under

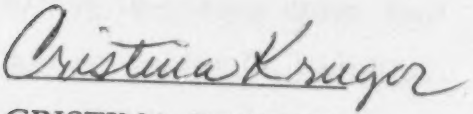
duress. The district court ignored the duress defense raised by the Krugers. The Krugers should not have had to prove the point by substantial evidence. See Fed R. Civ. P. 56(e). The Krugers merely needed to show some evidence that the fact issue was contested--which they did in their response to S.R.I.'s motion for summary judgment. Furthermore, the facts admitted by S.R.I., without more, support a finding of duress: S.R.I. admitted that they had not given Mr. Kruger his final paychecks, even though they were aware of Mr. Kruger's severe financial condition. Looking at that fact "in the light most favorable" to the Krugers, they certainly could have been under duress. "In the light most favorable," S.R.I. wrongfully withheld the Krugers' paychecks, knowing that the Krugers were extremely desperate for the money. As a result, the Krugers' felt they had no choice but to sign. The lower courts erred by deciding that the Krugers were not under duress. The issue should have been submitted to a finder of fact.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MANFRED KRUGER



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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED JANUARY 7, 1997.

SONIC RESTAURANTS, INC.,
Plaintiff-Appellee,

v.

MANFRED KRUGER;
CHRISTINA KRUGER,
Defendants-Appellants.

No. 96-6193
(D.C. No. CIV-95-796)
(W. D. Okla.)
Filed Jan. 7, 1997

ORDER AND JUDGMENT[1]

Before PORFILIO, BALDOCK. and HENRY, Circuit Judges.

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a.); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Defendants Manfred and Cristina [sic] Kruger appeal from the entry of summary judgment holding them in breach of the parties' "Termination of Independent Contractor Services and Release of Claims" (termination agreement), awarding plaintiff Sonic Restaurants, Inc. (Sonic.) compensatory damages, and enjoining future violations of the termination agreement. The district court relied on a lengthy list of undisputed facts to uphold the validity of the termination agreement, determine defendants' breach thereof, and grant appropriate relief. Upon de novo review, Kaul v. Stephan., 83 F.3d 1208, 1212 (10th Cir. 1996), we affirm for substantially the reasons stated in the district court's orders of March 22 and May 29, 1996.

Most of the objections broadly stated in defendants' appellate brief "lack even rudimentary substantiation in factual argument and legal authority." Washington v. Department of Transp., 84 F.3d 1222, 1223 (10th Cir. 1996). We shall therefore limit our discussion to the "discernible questions" raised regarding lack of consideration, execution of the agreement under duress, and procedural error on summary judgment. See id.

Defendants contend they were entitled to keep $15,000 in advances made before the parties severed their relationship and, hence, plaintiffs "forgiveness" of this outstanding "debt" in the termination agreement did not constitute valid consideration. This argument rests on an insupportable premise. The $15,000 had been a matter of dispute between the parties--a dispute acknowledged and settled by the very agreement defendants now attack by reassuming their adversarial pre-agreement position. Countenancing such a challenge, by which defendants seek to nullify a negotiated compromise essentially by reneging on it, would effectively destabilize any agreement intended to settle disputed

obligations. Further, and in any event, defendants do not adequately support their underlying position regarding the $15,000 with evidence, argument, and legal authority.

Defendants also attack the termination agreement on the ground that Manfred Kruger was under extreme duress at the time of its execution. However, defendants fail to cite any evidence in the record to substantiate this conclusory claim. Their reference to an affidavit executed months after the district court's decision is patently improper, see Aero-Medical, Inc. v. United States, 23 F.3d 328, 329 n.2 (10th Cir. 1991); Boone v. Carlsbad Bancorporation, Inc., 972 F.2d 1545, 1549 n.1 (10th Cir. 1992,), and we will not sift through the record searching for other, competent evidence to bolster their unsupported assertions of error, see Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 P.3d 1533, 1540 n.3 (10th Cir.), cert. denied, 117 S. Ct. 297 (1996).

Finally, defendants contend that the district court improperly adopted plaintiff's statement of undisputed facts. However, all we are told is that the seventeen facts in question "are contradicted by the

Defendants' evidence Filed in motions and 180 exhibits of evidence, like W-2's and payroll check stubs; statements of witnesses and other documents relating, to the employee status of Manfred Kruger; relating to the circumstances of the signing of the Termination Agreement of May 2, 199[5]; and the overall deception of [Sonic] with this Termination Agreement and in this Termination Agreement of May 2, 1995." Appellants' Opening Brief at 11. This catch-all record reference is plainly inadequate from a procedural/evidentiary standpoint, see S.E.C. v. Thomas, 965 F.2d 825, 827 (10th Cir. 1992), and, more fundamentally, fails to provide this court with specific, reasoned challenges to the various material facts relied on by the district court. The only particular fact implicated by the reference concerns Manfred Kruger's employment status, which actually was never determined in--indeed, was irrelevant to--the district court's disposition. Rather, the court merely recited the undeniable facts that defendants (1) conceded Mr. Kruger's status as an independent contractor in the termination agreement, and (2) later took action contrary to this concession. To the extent

defendants seek to attack the termination agreement by recanting this concession and resurrecting the employment-status dispute, they run afoul of the same principle discussed above in connection with the advances. One may not nullify an otherwise proper settlement by rearguing the merits of claims expressly resolved therein.

We have considered all of defendants' arguments and, whether explicitly addressed or tacitly reelected, each has been found to lack merit. Accordingly, the judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED. Defendants' motion to supplement the record is denied. The mandate shall issue forthwith.

Entered for the Court

John C. Porfilio
Circuit Judge

APPENDIX B
JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA FILED MAY 29, 1996.

SONIC RESTAURANTS, INC.,

Plaintiff

vs.

No. CIV-95-796-C

Filed May 29, 1996

MANFRED KRUGER and
CHRISTINA KRUGER,

Defendants

JUDGMENT

Upon consideration of the pleadings herein, the Court enters judgment in favor of the plaintiff and against the defendants.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff is awarded declaratory judgment against defendants Manfred Kruger and Cristina [sic] Kruger that the written agreement dated May 2, 1995, and entitled "Termination of Independent

Contractor Services and Release of Claims" (Exhibit A hereto) and the releases contained there are valid, enforceable, and binding.

2. Plaintiff is awarded a money Judgment in the amount of $35,485.63 (exclusive of attorney fees and costs).

3. Defendants are permanently and forever enjoined and prohibited from taking any action which violates the terms and conditions of the Termination Agreement.

4. Defendants are permanently and forever enjoined and prohibited from causing or contributing to causing another person or entity from taking any action which violates the terms and conditions of the Termination Agreement.

5. Defendants are specifically enjoined and prohibited from engaging in the following acts in violation of the Termination Agreement:

a. Claiming in any manner to have been an employee of plaintiff.

b. Filing or otherwise initiating any proceedings in which they claim to have been employees of plaintiff, included as such prohibited

proceedings are unemployment and workers' compensation proceedings;

c. Contacting personnel of plaintiff, its partners and employees of its partnerships to discuss the business activities of plaintiff, the operation of plaintiff's restaurants and/or defendants' previous business relationship with plaintiff;

d. Discussing with any third party the operation of plaintiff's restaurants or plaintiff's business activities,

e. Suggesting or alleging to any person, entity, agency, or tribunal any labor or health violations at any of plaintiff's restaurants;

f. Contacting the media concerning plaintiff, its affiliated entities, partnerships partners, and employees; and

g. Attempting to persuade any teamster union to picket or attempt to unionize plaintiff's partnership restaurants.

6. Defendant Manfred Kruger is specifically enjoined and prohibited from engaging In

the following acts in violation of the Termination Agreement:

a. Contesting in any manner his former status as an independent contractor of plaintiff;

7. Violation of this permanent injunction may be punished as contempt of Court.

DATED this 25th day of May, 1996.

ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE
ENTERED IN JUDGEMENT DOCKET ON
May 29, 1996.

EXHIBIT A -- Termination Agreement

TERMINATION OF INDEPENDENT
CONTRACTOR SERVICES
AND RELEASE OF CLAIMS

THIS AGREEMENT is made and entered into this 2nd day of May, 1995 by and between Manfred Kruger, ("M. Kruger") and his wife Cristina [sic]

Kruger ("C. Kruger"), who reside at 3900 Langdon, Greensboro, North Carolina 27410 (jointly and separately referred to as "the Krugers"), and Sonic Restaurants, Inc. ("SRI"), an Oklahoma Corporation with its principle offices at 101 Park Avenue, 14th Floor, Oklahoma City, Oklahoma 73102.

WITNESSETH:

WHERE AS, prior to April 23, 1995, SRI had contracted with M. Kruger as an independent contractor, to supervise certain of SRI's partnership Sonic Drive-Ins in North Carolina and Virginia;

WHERE AS, a dispute has arisen between SRI and M. Kruger concerning the repayment of certain advances taken by M. Kruger which total approximately $15,000.00;

WHERE AS, C. Kruger alleges that M Kruger hired her as an employee at one of SRI's partnership Sonic Drive-Ins and that while employed at the

drive-in she suffered lifting injuries which she claims caused her to suffer a miscarriage and hernia;

WHERE AS, a dispute has arisen concerning her as an employee of this Stanleyville Sonic Drive-In for her alleged work-related injuries; and

WHERE AS, M. Kruger, C. Kruger and SRI desire to settle their disputes and claims against on [sic] another on the terms and conditions

Now, therefore, in consideration of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto as follows:

1. Independent Contractor Status. M. Kruger acknowledges that he performed all of his services rendered to SRI and SRI's partnership Sonic Drive-In restaurants as an independent contractor and that he was not an employee of SRI or SRI Partnership Sonic Drive-In restaurants, Furthermore, M. Kruger agrees

that he will not contest his status as an independent contractor and, therefore, will not now or later claim that he was an employee of SRI, any entity affiliated with SRI, or any SRI partnership's [sic]. Therefore, M. Kruger agrees not to file any worker's compensation or unemployment claims or otherwise allege that he was an employee of SRI or any of SRI's Drive-In partnerships. M. Kruger agrees and acknowledges that he was not at any time a partner in any SRI Sonic Drive-In partnership.

2. Advances. SRI contends that M. Kruger made certain advances to himself from SRI's partnership Sonic Drive-In restaurants totaling approximately $15,000.00. M. Kruger contends that most, if not all of these advances were authorized, that they were intended to reimburse him for travel and other expenses related to the performance of his duties, and that crediting him with payments he owes less than $15,000.00.

3. Contractor Fees. M. Kruger claims and SRI agrees that M. Kruger has not been paid his monthly

contractor's fees of $5,500.00 for March and April, 1995. However, in consideration of the Krugers' willingness to sign the releases contained in this agreement, SRI agrees to immediately pay M. Kruger $5,500.00 for March's fees, pay M. Kruger $5,500.00 on or before June 1, 1995, $5,500.00 for April's fees, and forgive the entirety of the unpaid balance of the advances taken by M. Kruger which total approximately $15,000.00.

4. Taxes. In accordance with M. Kruger's status as an independent contractor, SRI will send M. Kruger at the appropriate time a 1099 Form instead of a W-2 form. M. Kruger agrecs to pay any and all self-employment taxes related to his contractor fees and any other sums paid to him.

5. Travel and Expenses. M. Kruger agrees and acknowledges that he has been reimbursed for any and all travel and other expenses directly or indirectly related to his services as an independent contractor and that such reimbursement occurred through the advances which he took and received.

6. Confidentiality. In consideration of SRI's willingness to pay M. Kruger the balance of $11,000.00 in contractor's fees and SRI's willingness to forgive the entirety of M Kruger's advances, the Krugers shall keep this Agreement strictly confidential at all times and shall not initiate nor maintain any communication with any present or former management or hourly employees of SRI's partnership Sonic Drive-In restaurants nor any partners of the partnerships of such drive-ins. In this respect the Krugers shall not discuss with anyone the particulars of any operations of SRI or SRI's partnership Sonic Drive-in restaurants. Similarly, the Krugers not contact anyone suggesting or alleging that any labor or health violations occurred or exist at any of SRI's partnership Sonic Drive-In restaurants. Furthermore, the Krugers will not counsel anyone else to do that which they have agreed not to do in this Agreement. The Krugers agree and understand that these prohibitions against contact include all forms of oral or written communication, including face-to-face meetings, telephone calls, and written

correspondence. In addition to the foregoing. the Krugers shall not contact, nor encourage anyone else to contact the media about SRI, any SRI affiliated entities, or SRI's partnership Sonic Drive-In restaurants, or their partners or employees. The media includes newspapers and radio and television stations. The Krugers are not to use indirect means to circumvent the restrictions imposed by this paragraph and this Agreement. C. Kruger agrees and acknowledges that she is directly benefitted, economically and otherwise, by SRI's willingness to pay the fees and forgive the indebtedness.

7. Teamsters. The Krugers agree to discontinue all efforts to persuade any teamster union to picket or otherwise attempt to unionize any of SRI's partnership Sonic Drive-In restaurants or any other Sonic Drive-In. The Krugers agree to notify, the teamsters unions which they previously contacted that all disputes have been resolved.

8. No Employee Status. C. Kruger agrees and acknowledges that although M. Kruger reportedly

employed her at the Stanleyville Sonic Drive-In on October 21-24, 1994, that she was M. Kruger's employee and that she was not an employee of the drive-in. Therefore, C. Kruger agrees not to file any worker's compensation or unemployment claims or otherwise allege that she was an employee of the Stanleyville Sonic drive-in.

9. Release by the Krugers. In consideration of SRI's willingness to pay the balance of $11,000.00 in fees to M. Kruger and SRI's willingness to forgive the advances taken by M. Kruger, the Krugers hereby forever release and discharge SRI, Sonic Corp., Sonic Industries Inc., Sonic Service Corp., and their respective officers, directors employees, and agents, and SRI's partnerships and their respective partners, employees, and agents (which partnerships include those for the Sonic Drive-Ins of Asheboro, Eden, Mt. Airy, N. Wilksboro, Stanleyville, Greensboro, Winston-Salem (Silas Creek), and Clemmons, North Carolina and Galax and Tazewell, Virginia) from any and all claims and demands, at law and in equity, known and unknown. The released claims and

demands include those which directly or indirectly are related to or arise from any claim by M. Kruger for any further independent contractor fees beyond the $11,000.00 total which SRI has agreed to pay for March and April, 1995, wrongful discharge as an independent contractor or as an employee, travel and other expenses related to M. Kruger's services rendered to SRI and SRI's partnership Sonic Drive-In restaurants, any and all worker's compensation and unemployment claims by M. Kruger and C. Kruger, any and all wages by M. Kruger and C. Kruger, and any and all miscarriage and hernia related claims by C. Kruger and M. Kruger, including bodily injuries, disabilities, medical and rehabilitation expenses, mental anguish, pain and suffering, and loss of consortium, as well as all future claims and demands related to the miscarriage and hernia. If any entity, agency, authority, or person later claims or determines that M. Kruger or C. Kruger, as the case might be, hereby forever releases and discharges such employer and the employer's officers, directors, employees, agents, partnerships and their affiliates, and all persons acting on behalf of any of them, from

all claims and causes of action, at law or in equity, known and unknown, including, but not limited to claims of discrimination based on such grounds as sex, race national origin [sic], disability, religion, citizenship, and age, wrongful discharge, and breach of contract, which may have accrued in favor of M. Kruger or C. Kruger as of the date of this Agreement.

10. SRI's Release. SRI, on behalf of itself and all of the parties released in the preceding paragraph, hereby forever releases and discharges the Krugers from any and all claims and demands, at law or in equity, known or unknown. The released claims and demands include those which directly or indirectly are related to or arise from M. Kruger's contractor services rendered to SRI and SRI's partnership Sonic Drive-In restaurants and M. Kruger's retention of advances totaling approximately $15,000.00.

11. Mutual Releases. All parties to this Agreement agree and acknowledge that the releases contained herein are mutual and that if any release if void or ineffective, that the other parties to this

Agreement may treat their releases as equally void or ineffective. The purpose of this paragraph is to ensure that all the parties are restored to their status quo positions before this Agreement was entered into, if any release is later deemed to be void or ineffective.

12. Liquidated Damages. If M. Kruger or C. Kruger breaches the terms of this Agreement, SRI shall have a claim against each and both of them for $11,000 00, plus all advances to M. Kruger (less all payments previously made by M. Kruger), as liquidated damages, not as a penalty, for such breach. Furthermore, all parties damaged by any such breach by the Krugers shall be entitled to receive from the Krugers any and all actual, special and consequential damages caused by their breach and shall be entitled to receive reasonable attorneys fees, costs and expenses related to enforcing this Agreement the Krugers. Furthermore, SRI shall have the right on behalf of itself and other parties released by the Krugers to seek injunctive relief without having to post a bond, to prevent M. Kruger and C. Kruger

from breaching the terms and conditions of this Agreement.

13. Books, Records, and Equipment. The Krugers shall return immediately to SRI in good condition, less normal wear and tear, any and all books, records, and equipment belonging to or leased by SRI or any of SRI's partnership Sonic Drive-In restaurants. Furthermore, the Krugers shall not use any information contained in such books and records to the detriment of SRI and SRI's partnership Sonic Drive-In restaurants, shall not to make or retain copies of any such books and records, and not release any such books and records to others without SRI's advance written consent, and should not disclose to others any information which either of them obtained or learned about SRI and SRI's partnership Sonic Drive-In restaurants while M. performed his contractor duties.

14. Waiver. The failure of a party to insist in any one or more instance on the performance of any term or condition of this Agreement shall not

operate as a waiver of any future performance of that term or condition.

15. Governing Law. Notwithstanding the place where the parties execute this Agreement, the internal laws of Oklahoma shall govern the construction of the terms and the application of the provisions of this Agreement. The federal and state courts in Oklahoma County, Oklahoma shall constitute the proper venue and forum for any action arising out of or in any way related to this Agreement. Each party to this Agreement hereby consents to any of those court's exercise of personal jurisdiction over the party in that type of action and expressly waives all objections the party otherwise might have to that exercise of personal jurisdiction.

16. Headings. The headings used in this Agreement appear strictly for the parties' convenience in identifying the provisions of this Agreement and shall not affect the construction or interpretation of the provisions of this Agreement.

17. Binding Effect. This Agreement binds and inures to the benefit of the parties and their respective successors, legal representatives, heirs and permitted assigns.

18. Amendments. No amendments to this Agreement shall become effective or binding on the parties, unless agreed to in writing by all of the parties.

19. Notice. Except as otherwise provided in this Agreement, when this Agreement makes provision for notice or concurrence of any kind, the binding party shall deliver or address the notice to the other party by certified mail or hand delivery via a nationally-recognized overnight delivery service, charges prepaid and properly addressed, to the following address or by telecopy to the following telecopy number:

M. Kruger: 3900 Langdon
Greensboro, North Carolina 27410
Telecopy Number: (910) 352-4349

C. Kruger: 3900 Langdon
Greensboro, North Carolina 27410
Telecopy Number: (910) 352-4349

SRI: 101 Park Avenue
Oklahoma City, Oklahoma 73102
Telecopy Number: (405) 280-7694

All notices pursuant to the provisions of this Agreement shall run from the date that the other party receives the notice or three business days after the party places the notice in the United States mail. Each party may change the party's address by giving written notice to the other party.

Executed as of the day and year first set forth above.

SRI: Sonic Restaurants, Inc.
By: /s/ Frank Young
(Vice) President

M. Kruger: /s/ Manfred Kruger

C. Kruger: /s/ Christina [sic] Kruger

APPENDIX C -- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DATED MAY 29, 1996.

SONIC RESTAURANTS, INC.,

Plaintiff No. CIV-95-796-C

vs.

MANFRED KRUGER and CHRISTINA KRUGER

Filed May 29, 1996

Defendants

ORDER

Plaintiff and defendants executed a written agreement entitled "Termination of Independent Contract Services and Release of Claim" (the "Termination Agreement"). On March 22, 1996, the Court granted partial summary judgment in favor of the plaintiff and against the defendants finding that, (1) the Termination Agreement and Releases contained therein are valid, binding, and enforceable; (2) defendants have materially breached the Termination Agreement; and (3) plaintiff is entitled

to monetary and injunctive relief. As recognized in the March 22, 1996, Order, the amount and type of remedy to which plaintiff was entitled could not be determined based on the evidence then before the Court. That is, although the Court found in plaintiff's favor on the issue of the viability of the Termination Agreement, to compute the damages the Court required evidence of plaintiffs actual damages. Additionally, plaintiff was directed to supply the parameters of the injunctive relief, On April 12, 1996, plaintiff filed a motion requesting an award of money damages and the entry of a permanent injunction. Defendants have failed to respond. On April 19 1996, defendant filed a notice of appeal of the Court's March 22, 1996, Order.

Local Rule 7.1(e) provides that for failure to respond, a motion may be deemed confessed. As noted above, defendants have not filed a response and have not requested or been granted an extension of time in which to respond. Clearly, defendants' April 19, 1996, Notice of Appeal is premature because the Court's March 22, 1996, Order addressed only plaintiff's motion for partial summary judgment, did

not contain an expression that there was no just reason for delay, and did not direct the entry of judgment. Fed. R. Civ. P. 54(b), Fed. R. App. P. 4(a); In re Chateuagay Corp., 922 F.2d 86 (2nd Cir. 1990). As set out in the Court's March 22, 1996, Order, there remained for resolution the issue of plaintiffs request for money damages and for an injunction. Any notice of appeal filed before this Court has either entered a final judgment, or made the certification noted above, is a nullity. A. O. Smith Corp. v. Sims Consol. Ltd., 647 F.2d 118 (10th Cir. 1981). In such a situation, the appellate court lacks jurisdiction. See generally McLauglhlin v. City of LaGrange, 662 F.2d 1385 (11th Cir. 1981): rehearing denied, 668 F.2d 536 (11th Cir. 1982), cert. denied, 456 U.S. 979 (1982); Beukema's Petroleum Co. v. Admiral Petroleum Co., 613 F.2d 626 (6th Cir. 1979) Thus, for the unopposed reasons set forth in plaintiff's motion, and for defendants failure to respond the Court, in its discretion and as permitted by LR7.l(e), finds that plaintiff's motion shall be granted.

IT IS THEREFORE ORDERED that plaintiff's request for money judgment and injunctive relief

is hereby granted Plaintiff is awarded the sum of $35,385.63 (exclusive of attorney's fees and costs.) A judgments shall enter that reflects this award and the specifics of the injunctive relief.

IT IS SO ORDERED this 29th day of May, 1996.

ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE
ENTERED IN JUDGMENT DOCKET ON
May 29, 1996

APPENDIX D

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DATED MARCH 22, 1996.

SONIC RESTAURANTS, INC., Plaintiff

vs.

MANFRED KRUGER and CHRISTINA KRUGER, Defendants

No. CIV-95-796-C

Filed March 22, 1996

MEMORANDUM OPINION AND ORDER

Plaintiff, Sonic Restaurants, Inc. ("Sonic"), brings this action to determine whether the parties Termination Agreement and release is valid. Plaintiff also seeks recovery of certain monies as a result of defendants' breach of the Termination Agreement. This case is now before the Court for consideration of plaintiff s motion for summary judgment filed on February 1, 1996. Although styled as a "Motion to Strike Plaintiff's Motion for

Summary Judgment," defendants' responsive pleading fully addressed all issues raised in Sonic's motion, including arguments and evidence in opposition to the motion. See Defendants' Motion to Strike Plaintiffs Motion for Summary Judgment (Feb. 8, 1996). The Court denies the motion to strike as no cause has been shown therefor and will treat defendants' motion to strike as a response to the motion for summary judgment. On February 21, 1996, plaintiff filed a reply to defendant's motion to strike. On March 8, 1996, defendants filed a "Reply to Plaintiffs Reply of February 21, 1996."

Local Rule 56.1 provides the framework to be followed in connection with a motion for summary judgment. Accordingly, the following facts are not in dispute.

1. Sonic, Manfred Kruger, and Christina [sic] Kruger executed a written agreement dated May 2, 1995, entitled 'Termination of Independent Contractor Services and Release of Claims' (the "Termination Agreement').

2. Manfred and Christina [sic] Kruger were given the opportunity to review, discuss, consider,

and negotiate the terms and provisions of the Termination Agreement prior to its execution.

3. Neither Manfred nor Christina [sic] Kruger expressed any disagreement with the terms and provisions of the Termination Agreement prior to its execution. Neither Manfred nor Christina [sic] Kruger expressed to Sonic any reluctance in executing the Termination Agreement. Neither Manfred nor Christina [sic] Kruger requested additional time from Sonic to review, discuss, and consider the terms and provisions of the Termination Agreement prior to its execution.

4. Mr. Kruger made demands and threats of legal action to Sonic after the termination of his relationship with Sonic and prior to execution of the Termination Agreement. The Termination Agreement recites that various disputes had arisen between the Krugers and Sonic prior to execution of the Termination Agreement and such disputes included, inter alia, (1) repayment of advances of $15,000.00 previously taken by Manfred Kruger; (b) personal injuries allegedly suffered by Christina [sic] Kruger and (c) the employment status of the Krugers.

5. The Termination Agreement contains Manfred Kruger's acknowledgment that he was an independent contractor, not an employee, of Sonic. The Termination Agreement also contains Christina [sic] Kruger's acknowledgment that she was not an employee.

6. The Krugers promised to keep the terms of the Termination Agreement confidential.

7. The Krugers promised to refrain from: (a) contesting Mr. Kruger's status as an independent contractor; (b) filing unemployment or workers' compensation claims and alleging to be Sonic employees; (c) contacting personnel of Sonic, its partners and employees of Sonic's partnerships; (d) discussing with third parties the operation of Sonic's restaurants; (e) suggesting or alleging any labor or health violations at any of Sonic's restaurants; (f) contacting the media concerning Sonic, its affiliated entities, partnerships, partners, and employees; and (g) attempting to persuade any teamster union to picket or attempt to unionize Sonic's partnership restaurants.

8. Sonic and the Krugers exchanged comprehensive mutual releases of all claims in the Termination Agreement.

9. Sonic and the Krugers agreed that the Termination Agreement binds and inures to their benefit and that of their respective successors, legal representatives, heirs, and permitted assigns.

10. In the course of Manfred Krugers pre-Termination Agreement demands and threats of legal action, he advised Sonic that he had consulted with legal counsel concerning his rights and legal remedies against Sonic. Manfred Kruger told Sonic that he had been referred to a "law company" on April 27, 1995, that specializes in labor disputes and on-the-job injuries. According to Manfred Kruger, the lawyers advised him of several legal remedies concerning his compensation, tax responsibility, travel expenses, and personal injures of Manfred and Christina [sic] Kruger. Manfred Kruger demanded payment from Sonic by May 4, 1995, and stated that, if payment was not made within that time frame, he would instruct the lawyers to start legal action and he would start "other actions' against Sonic (including,

but not limited to, contacting public health authorities, the Department of Labor, teamster unions).

11. On May 2, 1995, the Krugers and Sonic executed the Termination Agreement and Sonic delivered payment of $11,000.00 to Manfred and Christina [sic] Kruger in accordance with the terms and provisions of the Termination Agreement.

12. In accordance with the terms and provisions of the Termination Agreement, Sonic relinquished its right to pursue the recovery from Manfred Kruger of approximately $15,000.00 in allegedly unauthorized advances taken by Manfred Kruger.

13. On or about May 21, 1995, Manfred and Christina [sic] Kruger notified Sonic that they considered the Termination Agreement to be "null and void."

14. Manfred Kruger has contested his status as an independent contractor of Sonic, contrary to the terms and provisions of the Termination Agreement.

15. Manfred Kruger has filed an unemployment claim with the North Carolina Employment Security Commission ("NCESC'), contrary to the terms and provisions of the Termination Agreement.

16. Manfred Kruger has filed a workers' compensation claim, contrary to the terms and provisions of the Termination Agreement. He has also contacted the U.S. Department of Labor concerning Sonic's business activities and operation of restaurants contrary to the terms and provisions of the Termination Agreement.

17. The Termination Agreement provides for liquidated damages and injunctive relief in the event the Krugers breach the Termination Agreement. The liquidated damages include: (a) the $11,000.00 in contractor fees paid by Sonic to the Krugers' (b) the $15,000.00 in advances taken by Manfred Kruger; (c) all actual, special, and consequential damages caused by the Krugers' breach; and (d) reasonable attorney fees, costs, and expenses incurred by Sonic in enforcing the Termination Agreement.

Validity of the Termination Agreement and Release

Because the language of the Termination Agreement and release is an unambiguous contract, its terms will be enforced as a matter of law. Fisher v. Owens Comina Fiberglass Corp., 868 F.2d 1175, 1176 (10th Cir. 1989). Evidence in the record establishes that the defendants could read and comprehend the Termination Agreement and release. The defendants were given the opportunity to review, discuss, consider, and negotiate the Termination Agreement's terms and provisions. Moreover, defendants expressed no disagreement with the terms in the documents and did not request additional time to review and consider the documents. Defendants argue these documents must be determined invalid, based on the evidence and the case law; however, the Court is convinced otherwise. See discussion by the Tenth Circuit in Torrez v. Public Service Co. of New Mexico, Inc., 908 F.2d 687, 689-690 (10th Cir.1990) (factors to be considered when a court is called on to determine the validity of a release: clarity and specificity of the language, party's education and business experience, amount of time party had for deliberation about the release before

signing it, whether party knew or should have known his rights upon execution of the release, whether party was encouraged or in fact received benefit of counsel, whether there was an opportunity for negotiation of the terms of the agreement, and whether the consideration exchanged for the release exceeds the benefits to which the party was already entitled). The language in the documents is clear and specific. Defendants have not alleged the contract violates public policy. Accordingly, Sonic is entitled to judgment on its claims that the Termination Agreement and release are valid.

Release of Claims

In Sonic's first proposition, it urges the Court to find that litigation of defendants' counterclaims in this action are prohibited by the Termination Agreement and release. By order dated February 16, 1996, the Court dismissed defendants' counterclaims. Therefore, this proposition is now moot.

Defendants' Breach of the Termination Agreement

It is undisputed that defendants have committed acts prohibited by the Termination Agreement and, in light of defendants' activities, the Court concludes

defendants have breached the Termination Agreement and thus plaintiff is entitled to recover. Accordingly, Sonic is entitled to judgment on its claim that defendants have breached the Termination Agreement.

Remedy

Provisions in the Termination Agreement deal with the consequences should the Termination Agreement be breached. In addition to liquidated damages, the agreement refers to actual damages, attorney fees, costs, and an injunction to prohibit additional breaches. Plaintiffs evidence regarding the amount or type of actual damages presents a claim for $26,000 in liquidated damages ($11,000 contractor fees and $15,000 in forgiven advances) and injunctive relief, attorney fees, and costs. However, the total relief requested and formation of any injunctive relief do not appear capable of accurate calculation. See First Amended Complaint, ¶ C of Prayer ("Money damages in an amount adequate to compensate Plaintiff for all damage directly caused by Defendants' anticipatory repudiation and material breach of the written agreement entitled

'Termination of Independent Contractor Services and Release of Claims."). The Court will therefore treat plaintiffs motion as one for partial summary judgment and reserve the matter of remedy for further motion or hearing.

Conclusion

IT IS THEREFORE ORDERED that the motion for summary judgment filed on behalf of plaintiff, Sonic Restaurants, Inc., treated as a motion for partial summary judgment, is hereby GRANTED. There remains for determination the amount of plaintiff's damages and the extent of appropriate injunctive relief. The settlement conference scheduled March 28, 1996, will not be stricken but will be conducted as appropriate to resolve remaining issues. Failing amicable resolution, plaintiff is directed to present either a motion or request for hearing on the appropriate remedy no later than April 12, 1996. The case is stricken from the April trial docket. Plaintiff s motion to bifurcate is moot. A judgment shall enter following determination of appropriate remedy.

IT IS SO ORDERED this 22nd day of March, 1996.

Robin J. Cauthron United States District Judge